IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-958

AKTIEBOLAGET FLYMO, ET AL., *Petitioners*

v.

JOHN F. CODY, ET AL., *Respondents*

REPLY TO PETITION FOR WRIT OF CERTIORARI

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Respondents, as their reply to Petitioners' Petition for Writ of Certiorari, state as follows:

STATUTES AND LAWS INVOLVED

The Petitioners, quoting *Morgan* v. *Daniels*, 153 U.S. 120 (1894), contend that this decision was not followed by the District Court and the Court of Appeals. The Petitioners are simply wrong in that *Morgan* v. *Daniels, supra,* does, in fact, stand for the proposition that a District Court has a right to rule on the testimony in the case and, if the testimony "in character and amount carries thorough conviction," 153 U.S. 125, the District

Court may reverse the Patent Office. This test of "thorough conviction" was reviewed in some detail by the Court of Appeals in affirming the decision. (p. 5a *et seq.* Petitioners' Brief) 171 U.S.P.Q. 206, 209.

Of significance is the fact that, after the decision in *Morgan* v. *Daniels*, *supra*, Title 35 U.S.C., Section 146, was enacted, which states, in part:

> The testimony and exhibits of the record in the Patent Office when admitted shall have the *same effect* as if originally taken and produced in the suit. (Emphasis added)

Therefore, not only does *Morgan* v. *Daniels*, *supra*, permit the District Court to rule upon the evidence taken in the Patent Office, but the statute specifically provides that this evidence shall have the same "effect" as if originally taken and produced in the suit.

On page 4 of the Brief for Petitioners, the Petitioners, for the first time in this proceedings, refer to the Federal Administrative Procedure Act, Title 5, U.S.C., Section 706. It is believed that since no issue similar to this was raised in the District Court or the Court of Appeals, the issue cannot now be raised. *Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967), rehearing denied 386 U.S. 1027, 87 S. Ct. 1366.

STATEMENT OF THE CASE

This is a patent interference case involving a flying lawn mower which is supported slightly above the ground by a blast of air as the blade cuts the grass.

The application of the Petitioners and the Respondents were filed in 1962. Patent No. 3,110,996 was

issued to the Petitioners in 1963. Within the year permitted by 35 U.S.C. 135, the Respondents copied certain claims of the Petitioners' patent and an interference was subsequently declared in the Patent Office. The Petitioners were awarded priority by the Patent Office (Petitioners' Appendix 36a) and hence the interference was dismissed by the Patent Office.

The Respondents then took an appeal under 35 U.S.C. 146 to the District Court for the District of Columbia. In a Motion for Summary Judgment filed by the Respondents, the District Court, upon the record in the Patent Office, reversed the Patent Office, thereby awarding priority to the Respondents. (Petitioners' Appendix 31a), 163 U.S.P.Q. 607, 306 F. Supp. 728. This District Court decision was affirmed by the Court of Appeals. (Petitioners' Appendix 1a), 171 U.S.P.Q. 206, ...F2d.....

Throughout the proceedings, the Petitioners have not seriously questioned that the Respondents built a machine corresponding to the counts in interference, prior to the earliest date upon which the Petitioners can rely;[1] however, the Board of Appeals in the Patent Office determined that the Respondents' proof was not sufficient to show "acceptable" or "satisfactory" operation of the machine built by the Respondents (Petitioners' Appendix 38a-40a). The District Court held that Respondents' proof was sufficient to show a satisfactory operation of the machine. 306 F. Supp. 729 (Petitioners' Appendix p34a). The Court of Appeals then affirmed. (Petitioners' Appendix 1a).

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[1] Title 35 U.S.C. 120 precludes proof by Petitioner of reduction to practice prior to their effective filing date.

ARGUMENT

A. Importance of the Case

It is significant to note that this is simply one of many interference cases which come before the District Court for the District of Columbia and before the Court of Appeals for the District of Columbia. The issues are unique to this particular case and have no widespread or general importance. Furthermore, there is no Constitutional question involved and there is no conflict of decisions between the respective circuits.

Only Respondents took testimony and hence the testimony, itself, is not in dispute. The weight and sufficiency of the testimony as applies to "reduction to practice" is involved. Thus, the District Court did not believe testimony which was disbelieved by the Patent Office or disbelieved testimony which was believed by the Patent Office. Instead, the District Court determined the weight of the testimony as a matter of law in determining priority.

As quoted above, Title 35 U.S.C., Section 146, clearly permits the record in the Patent Office to have "the same effect as if originally taken and produced in the suit." The Petitioners, however, wish this Court to hold that the above-quoted portion is *not* the law. Instead, the Petitioners wish this Court to hold that the District Court cannot give any other interpretation to the record produced in the Patent Office except that interpretation given by the Patent Office. In other words, the Petitioners are asking the Court to rule that the testimony from the record in the Patent Office *shall not* have the "same effect as if originally taken and produced in the suit."

On page 7 of Petitioners' Brief, Petitioner cites many non-patent cases to inject a new issue into this case and to have an appeal from the interference governed by the Federal Procedures Act, not by 35 U.S.C. 146. This is a novel approach belatedly presented.

B. Uniformity of Decisions and Conflict of Law

There appears to be no conflict between circuits in this matter.

Under this subheading B, the Petitioners have built-up a straw man which is then knocked over. This straw man, however, is based upon Federal Administrative Procedures Act which was not injected into this case prior to petitioners' Petition. Suffice it to state that, if the above-quoted Section 35 U.S.C. 146 does not give the District Court latitude to review the evidence presented in the Patent Office and to make its own determination, with due weight being given the decision below, the quoted statement, i.e., "the testimony and exhibits of the record in the Patent Office when admitted shall have the same effect as if originally taken and produced in the suit", means nothing.

C. Scope of Jurisdiction of Federal Circuit Courts in Considering Question of Fact and Not Questions of Law Only

Again, the Petitioners, under subheading C, are relying upon the Federal Administrative Procedures Act in an attempt to circumscribe the scope of review of interferences by the Federal Courts. Under this subheading, on page 9 of Petitioners' Brief, the Petitioners again refer to the Federal Administrative Procedure Act which has not heretofore been involved in this litigation and concludes that Title 35 U.S.C. 146 does not permit the Court to overrule the "findings of fact

of the Patent Office on a record without new evidence or a trial *de novo*."

All three issues presented by Petitioners boil down to only one and the Court of Appeals eloquently reviewed the law, in great detail, on the weight to be given the findings of the Patent Office. (Petitioners' Appendix p. 5a-12a)

CONCLUSION

It is respectfully submitted that the present case is not of such importance that it should be reviewed by the Supreme Court. No real dispute or difference of opinion is found between the Circuits and no situation of National importance is involved. Belatedly, the Petitioners wish to change their tactics and rely on the Federal Administrative Act, Title 5, Section 706, *United States Code*. This newly presented theory should not warrant a review by the Supreme Court.

Respectfully submitted,

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